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In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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26 pp

QUESTION PRESENTED

Whether Section 27 of the Federal Power Act, 16 U.S.C. 821, reserves to the States the power to impose requirements on a hydroelectric project that are more stringent than those specified in a license issued by the Federal Regulatory Energy Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 877 F.2d 743. The pertinent orders of the Federal Energy Regulatory Commission (Pet. App. A4-A22, A23-A36) are reported at 38 F.E.R.C. ¶ 61,240 and 41 F.E.R.C. ¶ 61,198.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1989. The petition for a writ of certiorari was filed on August 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), empowers the Federal Energy Regulatory Commission, *inter alia*, to "issue licenses * * * for the purpose of constructing, operating, and maintaining" hydroelectric projects "necessary or convenient for * * * the development, transmission, and utilization of power across, along, from, or in any streams or other bodies of water" that are subject to Congress's regulation under the Commerce Clause. Section 10 of the Act, 16 U.S.C. 803, establishes various conditions that must be included in any such license, and permits the Commission to impose other conditions not inconsistent with the provisions of the Act. At the time when the license in this case was issued, the Act required, as one condition to any license, that the project be "such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes." 16 U.S.C. 803(a) (1982).

In keeping with this "comprehensive" responsibility, the Commission's regulations have long required license applications to provide information on a variety of subject matters—including an "Environmental Report." Under the regulations in effect at the time that the application in this case was filed, for projects of the type at issue, an environmental report was required to contain a description of (i) "the environmental setting of the project, including * * * fish and wildlife resources;" (ii) a description of "the expected environmental impacts from proposed construction or development and the proposed operation of the power project * * * and an explanation of the specific measures proposed by the applicant, [federal, state, and local] agencies, and others to protect and enhance environmental resources and values and to mitigate adverse impacts of the project on such resources," together with an explanation of the applicant's "reasons for not undertaking any measures proposed by any agency consulted;" and (iii) a description of "the steps taken by the applicant in consulting with Federal, state, and local agencies with expertise in environmental matters." 18 C.F.R. 4.61 (d)(2)(i)-(iii) (1982).[1]

b. With the passage of the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (the ECPA), Congress amended the Federal Power Act to clarify and enhance the Commission's responsibility to weigh the effect of hydroelectric projects on the environment, including fish and wildlife. "In deciding whether to issue any license," the Commission is now obligated "in addition to the power and development purposes for which licenses are is-

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[1] The cited regulation applied to "minor projects" and "major projects" whose generating capacity did not exceed 5 megawatts. See 18 C.F.R. 4.60 (1982). More detailed studies were required for "major projects" whose capacity exceeded 5 megawatts. 18 C.F.R. 4.41(f) (1982). Specifically, such an application was required to include a *"Report on Fish, Wildlife, and Botanical Resources"* containing considerable detail on those subjects. 18 C.F.R. 4.41(f)(3) (1982).

The regulations prescribing the contents of applications for major and minor projects have changed since 1982, but all versions have required the applicant to provide information on the environmental consequences of a project, including potential effects on fish and wildlife.

sued, * * * [to] give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat) and protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. 797(e). Each license must now include conditions for the protection and enhancement of fish and wildlife affected by the project. 16 U.S.C. 803(j)(1). The Commission must base such conditions on recommendations from federal and state fish and wildlife agencies. When the Commission finds that any such recommendation would be inconsistent with the purposes of the Act, it is required to attempt to resolve the inconsistency with the agencies involved, giving due weight to their expertise, and, failing that, to make express findings regarding the basis for departing from the recommendation. 16 U.S.C. 803(j)(1) and (2).

c. Against this background, Section 27 of the Act, 16 U.S.C. 821, protects specified types of state laws from preemption. It provides that nothing in the Act:

> shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

The question presented by this case is whether, in light of the Commission's comprehensive authority to consider and provide for the environmental consequences of hydroelectric projects in its licensing determinations, Section 27 nevertheless reserves to States the power to limit for environmental purposes the quantity of water that may be diverted to a licensed hydropower project.

2. The project at issue here is a 3,000-kilowatt hydropower facility located on Rock Creek, a tributary of the South Fork of the America River of California. Licensed by the Commission in 1983, and completed in the spring of 1986, the Rock Creek facility is a diversion project that withdraws water from Rock Creek to run power turbines, and returns the water to the America River approximately a mile downstream. The affected stretch lies entirely within federal public lands. As a condition of the license, the Commission required the project to maintain interim "minimum flow rates" within this one-mile stretch of 11 cubic feet per second (cfs) from May through September and 15 cfs from October through April. The purpose of this condition was to protect the creek's fish population. The license also required the project operator, the Rock Creek Limited Partnership, to conduct studies in conjunction with the California Department of Fish and Game to enable FERC to set long-term minimum flow rates. Pet. App. A2-A3.

The partnership concurrently applied for, and in February 1984 was issued, a state water use permit. The permit set interim minimum flow rates at the same levels prescribed by FERC, and also required the partnership to conduct studies with the relevant state agencies to enable the State to set its long-term minimum flow rates. In March 1987, after the project had been completed, the state authorities amended the state permit by setting long-term minimum flow rates higher than those established in the FERC proceeding—rates of 60 cfs from March through June and 30 cfs from July through February. The effect of this new limitation was to allow the partnership to divert significantly less water from Rock Creek than the FERC license permitted. See Pet. App. A3-A4; Pet. 3.

3. In the meantime, the partnership petitioned FERC for an order that the Commission had exclusive jurisdiction to establish long-term minimum flow rates. In submissions to the Commission, the partnership argued that compliance with the 30 cfs and 60 cfs requirements that California authorities were proposing would render the project economically infeasible. Pet. App. A16-A17.

In March 1987, the Commission issued a declaratory order holding that the State "has no authority to set minimum flows for the project that conflict with those contained in the [FERC] license" and that the partnership "must comply" with FERC's flow rates "until otherwise ordered by the Commission, irrespective of any action taken by [the state water authority]." Pet. App. A18.[2] The Commission explained that "[t]he imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process" under the Federal Power Act and that, "[a]s such, the establishment of minimum flows is a matter beyond the reach of

[2] At the same time, the Commission ordered hearings to be held to fix long-term minimum flow rates for the project. Pet. App. A22. Those hearings were held in July 1987 before an administrative law judge; the ALJ's subsequent opinion, *Rock Creek Limited Partnership*, 41 F.E.R.C. ¶ 63,019 (Nov. 16, 1987), recommended minimum flow rates which were more stringent than the FERC set interim flow rates, but less stringent than the State's final rates. An appeal from the ALJ's decision is currently pending before the Commission.

In connection with proceedings before the Commission to fix its long-term minimum flow rates, California authorities filed comments recommending that the Commission fix rates at the levels ultimately prescribed by the state permit for the project. Pet. App. A15-A16.

state regulation." "Allowing states to prescribe minimum flows for licensed projects would interfere with the Commission's balancing of competing considerations in licensing," the Commission continued, "and would essentially vest a veto authority over projects in the states." *Id.* at A17-A18. Quoting from this Court's decision in *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 164 (1946), the Commission concluded that "[s]uch a veto power easily could destroy the effectiveness of the Federal Act," since "[i]t would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgement of the Federal Power Commission." Pet. App. A18.

Petitioner sought leave to intervene in the proceeding and filed a request for rehearing of the Commission's declaratory order. The Commission granted leave to intervene but denied rehearing. Pet. App. A23-A36. The Commission reviewed this Court's decision in *First Iowa* at length, and concluded that the decision "clearly stands for the proposition that state laws that interfere with the Commission's comprehensive planning responsibilities under Section 10(a) of the FPA are preempted." *Id.* at A28. The Commission reiterated that "the imposition of minimum flow releases for fishery protection and other purposes is an integral part of the Commission's comprehensive planning and licensing process," and that interpreting Section 27 to allow States to prescribe minimum flow releases would render the Commission's comprehensive planning and responsibility "meaningless." *Id.* at A29.[3] The Commission rejected

[3] The Commission noted that its licenses prescribe conditions, such as those relating to minimum flow releases, that it believes will provide the appropriate level of environmental

the State's argument that the Court's interpretation of Section 27 in *First Iowa* was dictum that had been overruled *sub silentio* in *California* v. *United States*, 438 U.S. 645 (1978). Pet. App. A30-A31, A34.

Finally, although it noted that the 1986 amendments to the Federal Power Act postdated the licensing determination at issue here, the Commission found that those amendments "reinforced [its] interpretation of Section 27." Pet. App. A35. It explained that if States were permitted to specify minimum flow rates for projects, the Commission could not "carry out [its] obligation to give equal consideration to all of the values" referred to in Section 4(e) of the Act (see pp. 3-4, *supra*), since States could "negate the set of conditions imposed by [the Commission] to effectuate [its] equal consideration of these values." Pet. App. A35-A36. It would also be "incongruous," the Commission continued, if state agencies that must be consulted under Section 10(j) of the amended Act, 16 U.S.C. 803(j)—but have no authority to prescribe license conditions protecting fish and wildlife—could nevertheless impose minimum flow requirements under state law. Pet. App. A36.

4. California petitioned for review, and the court of appeals affirmed. Pet. App. A1-A13. Examining

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protection and energy generation, and that it will not issue a license if conditions necessary to protect environmental resources would render a project economically infeasible. The Commission explained the effect that the State's interpretation of Section 27 would have on those determinations (Pet. App. A29):

> After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state.

the Federal Power Act "as a whole," the court of appeals reviewed the statutory provisions giving the Commission authority to oversee hydropower development; the court concluded that "[t]he weight of the comprehensive planning authority and the individual powers assigned to support that authority falls quite heavily on the side of federal exclusivity." *Id.* at A7-A8.

Turning to Section 27, the court observed that the provision could support "two conflicting readings"—one under which state authority was limited "to the area of property rights involving water for irrigation, municipal use, and related activities" and another under which the States would have "final authority over all issues connected to the control and use of water by a project licensed under the FPA." Pet. App. A8-A9. The court determined that the *First Iowa* decision required it to adopt the first of these interpretations. After an extensive review of that decision, the court of appeals concluded that *First Iowa*'s "reading of section 27 and the FPA as a whole teaches that Congress intended federal law to preempt state regulation in all aspects of hydropower projects save for the limited proprietary exceptions specified in [Section 27]." *Id.* at A11. Like the Commission, the court of appeals also found "unconvincing" petitioner's argument that *California* v. *United States*, *supra*, had overruled *First Iowa*'s interpretation of Section 27. The court observed that "[a] more reasonable interpretation of *First Iowa* and *California* is that they address two different and entirely separate water use programs." Pet. App. A12.

Finally, the court of appeals rejected petitioner's argument that the state minimum flow requirements did not amount to a "veto" of the Rock Creek project.

It explained that "[c]hanging the flow rates in such a significant fashion would directly affect the project's ability to run its turbines and generate electricity at the level stated in the FERC license and could jeopardize the economic feasibility of the project. It would, in essence, create a different type of hydropower project from the one described in the license." Pet. App. A12.[4]

ARGUMENT

Over forty years ago, in *First Iowa Hydro-Electric Coop.* v. *FPC*, 328 U.S. 152, 180 (1946), this Court recognized that the Federal Power Act grew out of efforts "to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so." To that end, the Act established "a dual system of control" over hydropower projects, under which state and federal agencies would have final authority in their own jurisdictions, rather than "a dual system of futile duplication of two authorities over the same subject matter." *Id.* at 167, 171. Section 27, the Court found, was "thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the [Act]." 328 U.S. at 176.

The Commission and the court of appeals properly applied the principles of *First Iowa* to this case when they held that the Federal Power Act confers on

[4] In the reprint of the court's decision in the appendix, the next sentence reads, "In effect, this does not constitute a veto of the project that was approved and licensed by FERC." It is clear from the context, however, that the addition of the word "not" is a misprint, and in the Federal Reporter, "not" is omitted.

the Commission the ultimate authority to fix minimum flow rates for the Rock Creek project. The court's decision does not conflict with any other decision of this Court or other courts of appeals, and the 1986 amendments to the Act confirm the correctness of the court's understanding of the division of authority between the Commission and the States in this area. Further review is therefore not warranted.

1. Throughout its brief, petitioner stresses only a portion of the language of Section 27—the statute's reference to state laws "relating to the control, appropriation, use, or distribution" of water. *E.g.*, Pet. 7, 15. However, that provision does not save all state laws addressing any of those subjects. Rather, the Act preserves only statutes relating to "water used in irrigation or for municipal or other uses, or any vested right acquired therein." The state regulation at issue in this case is plainly not one that governs "water used in irrigation or for municipal * * * uses" and has nothing to do with "vested rights." It thus must be the State's position that the reference to "other uses" extends to state laws touching upon the very matters that the Commission considers and addresses by means of conditions in the licenses it issues for hydropower projects.

As *First Iowa* makes clear, that contention cannot be reconciled with the language of Section 27 or the structure of the Act as a whole. In *First Iowa*, an applicant was seeking a license to build a power project on navigable waters in Iowa. The State argued that the Commission was obligated to deny the license on the ground that the applicant had not complied with Section 9(b) of the Act, 16 U.S.C. 802(b) (1982), which requires an applicant to provide evidence of

compliance with certain state laws. Specifically, the State contended that the applicant could not get a license unless it secured a state permit for the construction of a dam, which was available only upon compliance with state standards for the construction, operation and maintenance of such a work and a showing that "any water taken from the stream in connection with the project is returned thereto at the nearest practicable place." 328 U.S. at 164-166 (emphasis omitted).

The Court noted that requiring compliance with the Iowa law would grant state authorities "a veto power over the federal project" that could "destroy the effectiveness of the Federal Act" and "subordinate to the control of the State the 'comprehensive' planning" with which the Commission was charged. 328 U.S. at 164. Further, the Court continued, the particular requirements of the state statute at issue "would subject to state control the very requirements of the project that Congress has placed in the discretion of" the Commission and would "strike at the heart of the present project." *Id.* at 165, 163. In order to determine whether the statute required those untoward results, the Court examined the Act as a whole to determine what line it drew between state and federal authority. Because that analysis is so clearly relevant to this case, we quote it at length (328 U.S. at 167-168 (emphasis added)):

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. *The duality does not require two agencies to share in the final decision on the same issue. Where the Federal Government supersedes the state government there is no suggestion that the two agencies both shall have final authority.* In fact a contrary policy is indicated in §§ 4(e), 10(a), (b), and (c), and 23(b). In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. *A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable.*[5]

The Court found that both Section 9(b) and Section 27, the provision at issue here, embodied this division of authority. The Court found that Section 27 was a "saving clause" that was "limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." 328 U.S. at 175-176. The Court concluded, accordingly, that it "has primary, if not exclusive reference to such proprietary rights." *Id.* at 176. The Court found further support for a limited interpretation of Section 27 in that provision's reference to "any vested right acquired therein,"

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[5] The Court stressed this understanding of the Act repeatedly throughout its opinion. *E.g.*, 328 U.S. at 171 (Federal Power Act "has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter"); *id.* at 181 ("The detailed provisions of the Act leave no room or need for conflicting state controls.").

and the Court reiterated, relying on the maxim of *ejusdem generis*, that the phrase "other uses" was "confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes." *Ibid.*[6] Far from suggesting that state and federal authorities should duplicate one another's efforts, the Court continued, Section 27 "strengthens the argument that, in those fields where rights are not thus 'saved' to the States, Congress is willing to let the supersedure of the state laws by federal legislation take its natural course." *Ibid.*

At several levels, therefore, *First Iowa* requires rejection of petitioner's position in this case. That position—that both state and federal authorities may set flow rates for the purpose of protecting fisheries—is directly contrary to *First Iowa*'s construction of the Act as precluding overlapping regulatory authority. Petitioner's interpretation of Section 27 is also impossible to reconcile with the Court's explanation of the limited scope of the phrase "other uses," the language on which the State must rely here. As both the Commission and the court of appeals correctly concluded (Pet. App. A11, A30-A31), these elements of the Court's decision in *First Iowa* cannot be dismissed as mere dicta. Petitioner's construction of Section 27 in fact contradicts the understanding of the Act on which the Court's holding was based.[7]

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[6] It is difficult to characterize a state regulation establishing a minimum flow rate as involving a "use" of the water. But in any event, that "use" bears no resemblance to the specified uses—irrigation and municipal use—by reference to which the phrase "other uses" should be construed.

[7] *First Iowa* also found that the legislative history of the Federal Power Act was consistent with the Court's understanding of the Act. 328 U.S. at 176-177 n.20. This discussion forecloses petitioner's argument for a different interpretation of the same history. See Pet. 16-17.

2. Nor is there any conflict between *First Iowa*'s interpretation of the Federal Power Act and the Court's decision in *California* v. *United States*, *supra*. In *California*, the only question presented was whether, under Section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 390,[8] the federal government was required to comply with conditions in a state permit allocating water to a federal reclamation project. 438 U.S. at 647. The Court held that the government was required to comply with conditions that were not inconsistent with "clear congressional directives." See *id.* at 672. In reaching that conclusion, the Court had no occasion to consider the division of authority between the state and federal governments under the Federal Power Act, and it did not refer to, let alone overrule, the decision in *First Iowa*.

For reasons that the Commission explained, there are good grounds for distinguishing *First Iowa* and *California* v. *United States*. Section 8 of the Reclamation Act of 1902 requires the Secretary of the Interior, in carrying out the provisions of that Act, to proceed "in conformity with" state laws, whereas the Federal Power Act gives the Commission a "comprehensive

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[8] This statute provides, in pertinent part:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws * * *.

planning role with respect to hydro-electric development on Commerce Clause waters." Pet. App. A34. Thus, "the Court in *California* did not have to address a potential conflict between state requirements and project conditions developed through an agency comprehensive planning process mandated by statute." *Id.* at A34-A35; see *id.* at A12.[9]

Finally, this Court has consistently recognized the continuing vitality of *First Iowa*, both before and after *California*. See, *e.g.*, *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 445-446 & n.16 (1955); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 338-339 n.6 (1982); *Pacific Gas & Electric Co.* v. *State Energy Resources Commission*, 461 U.S. 190, 223 n.34 (1983). Hence, if this settled interpretation of the Federal Power Act is to be reconsidered, it would be the province of Congress rather than this Court to do so.

3. Petitioners argue, not entirely consistently, (i) that there is no conflict between state and federal regulation of the Rock Creek project (Pet. 23-25) and (ii) that the Ninth Circuit's decision upholding the Commission's order will result in inconsistent

[9] Petitioner's argument that *California* overruled *First Iowa sub silentio* is essentially a syllogism taking the following path: (1) Section 27 of the Federal Power Act was patterned after Section 8 of the Reclamation Act of 1902; (2) *California* construed Section 8 to preserve state water laws other than those encompassed by a so-called "proprietary rights theory;" (3) Section 27 must therefore save the same kinds of state laws; and (4) *California* must be understood to overrule *First Iowa*'s dictum to the contrary. See Pet. 7-12. However, no counterpart of the Court's analysis of the Federal Power Act was before the Court in *California*, and, even if there had been, Sections 8 and 27 would properly be interpreted as parts of two quite different statutory schemes.

regulation of rights in the same river (*id.* at 21-23). These contentions are without merit and do not warrant this Court's review.

a. According to petitioner, there is no inconsistency between the Commission's license and the State's permit, because petitioner has not denied a state permit altogether and "the project, in complying with the more stringent state requirements, will necessarily comply with the less stringent FERC requirements." Pet. 23-24. The Commission explained, however, why more stringent state requirements nevertheless impinge on its congressionally-mandated judgments (Pet. App. A29):

> Interpreting Section 27 as granting to the states the authority to prescribe minimum flow releases for projects, as advocated by [petitioner] would render meaningless our comprehensive planning authority and responsibility under Section 10(a). After having carefully balanced competing considerations and issued a license with conditions effectuating the balance we have struck pursuant to Section 10(a), our balancing could be undone by minimum flow or other water-related conditions imposed by a state. By imposing higher minimum flows than prescribed in a license, a state could require greater environmental protection than we determined necessary and could cause a project to become economically infeasible.

As the court of appeals put it, petitioner's approach "would, in essence, create a different type of hydropower project from the one described in the license." *Id.* at A12. Thus, even if petitioner's minimum flow requirements would not amount to an absolute veto of the project—an assumption that the project's sponsors have vigorously challenged in proceedings be-

fore the Commission (see *id.* at A17)—they epitomize the kind of interference with the Commission's comprehensive planning judgments that *First Iowa* decried.[10]

b. Petitioner's claim that its position must be adopted to avoid "potentially inconsistent regulation of water rights in the same river" (Pet. 22) is greatly overstated. Under Section 9(a)(2) of the Act, 16 U.S.C. 802(a)(2), an applicant must present "[s]atisfactory evidence" that it has complied with specified categories of state laws. Though compliance with this provision does not require a showing that all state requirements have been satisfied, see *First Iowa Electric Coop.* v. *FPC*, *supra*, it does enable the Commission to consider carefully the extent to which any project has not received full state approval. Further, even before the passage of the ECPA, the Commission's regulations required applicants to consult with

[10] In *First Iowa*, 328 U.S. at 167, the Court indicated that state regulations would conflict with the Commission's planning authority even when the State did not purport to prohibit a project altogether (*ibid.*):

> Compliance with state requirements that are in conflict with federal requirements may well block the federal license. For example, compliance with the state requirement, discussed above, that the water of the Cedar River all be returned to it at the nearest practicable place would reduce the project to the small one which is classified by the Federal Power Commission as "neither desirable nor adequate." Similarly, compliance with the engineering requirements of the [State], if additional to or different from the federal requirements, may well result in duplications of expenditures that would handicap the finanical success of the project.

See also *Pacific Gas & Electric Co.*, 461 U.S. at 223 n.34.

state agencies concerning the environmental consequences of their projects and to include in their applications copies of documents reflecting those consultations—including, under the regulations in effect when the application here was filed, materials showing "any terms or conditions of licenses that those agencies have determined are appropriate to prevent loss of, or damage to, natural resources." 18 C.F.R. 4.61(d)(2)(iii) (1982).[11] The Commission is thus in a position to consider any valid claim that a hydropower project will undercut a state regulatory program.

To the extent that the Commission does license hydroelectric projects on terms different from those that state authorities would prefer, it is acting in accordance with the power Congress expressly conferred. To require applicants for federal licenses to obtain state permits addressing the very issues that the Commission resolves would "subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the [Commission] or other representatives of the Federal Government." *First Iowa*, 328 U.S. at 164. At bottom, petitioner's claim of inconsistency is an attack on the scheme that Congress adopted in the Federal Power Act. That scheme does not allow

[11] For larger projects, additional detail was required. See 18 C.F.R. 4.41(f) (1982) (requiring preparation of an Environmental Report after specified consultation with appropriate federal, state, and local resources agencies). The Commission promulgated more detailed requirements for consultations with state agencies after the passage of the ECPA. 18 C.F.R. 4.38.

duplicate regulation by States in areas to which the Commission's comprehensive authority extends.[12]

4. Finally, the recent passage of the ECPA confirms the correctness of the court of appeals' decision. That legislation eliminates all possible doubt that the Commission is to have the final authority, after following specified procedures and giving specified weight to the views of state agencies, to establish conditions with which hydroelectric projects must comply in order to protect the environment. The subsequent congressional enactment carries "considerable retrospective weight." *Heckler* v. *Turner*, 470 U.S. 184, 211 (1985). See also *South Carolina* v. *Regan*, 465 U.S. 367, 378-379 n.17 (1984).

As amended by the ECPA, the Federal Power Act now requires the Commission (i) to give "equal consideration" to the environmental consequences of a project, including "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," 16 U.S.C. 797(e), and (ii) to include in each license conditions "for such protection, mitigation, and enhancement," 16 U.S.C. 803(j)(1). Those conditions must be based on recommendations received from federal authorities and "State fish and wildlife agencies." 16 U.S.C. 803(j)(1). The Act establishes a specific procedure governing situations in which the Commission believes that a recommendation from a state agency is inconsistent with the statute's purposes and requirements. The Commission and the agency must first attempt to resolve any such inconsistency; to the extent that they fail, the Commission must publish findings (accompanied by a statement of their basis) that the state agency's recommendation is inconsistent with the Act and that the conditions selected by the Commission comply with the goal of protecting and enhancing fish and wildlife. 16 U.S.C. 803(j)(2).

[12] For the same reason, there is no merit to petitioner's related contention that the court of appeals' reliance on the Commission's comprehensive planning authority was misplaced (Pet. 18-21).

It is impossible to reconcile these provisions with petitioner's interpretation of Section 27, which was left unchanged by the ECPA. Congress would not have established a detailed procedure under which the Commission was to consider the recommendations of state agencies, attempt to resolve any disputes, and make findings regarding irreconcilable differences if it understood that Section 27 reserved to the States the power to impose their recommedations unilaterally.[13] The ECPA therefore reflects unmistakably Congress's adherence to *First Iowa*'s division of responsibility between state and federal authority.[14] Reconsideration of *First Iowa* at

[13] In this case, petitioner recommended adoption of its minimum flow rates in proceedings before the Commission. Pet. App. A15. This case thus demonstrates the "incongruous" (*id.* at A36) situation that would necessarily result from adoption of petitioner's construction of Section 27. Under that view, States could first "recommend" conditions within the area of the Commission's authority and, if those conditions were rejected, impose them.

[14] The conference report accompanying the ECPA described the relevant roles of the States and federal governments in terms that evoke the Court's reasoning in *First Iowa* (H.R. Rep. No. 934, 99th Cong., 2d Sess. 23 (1986)):

> Section 10(j) does not give such agencies a veto, nor does it give them mandatory authority,* * *
>
> Under new section 10(j), FERC is empowered to decide license terms and conditions, but there is a guarantee

this time would interfere with the considered scheme Congress has recently devised to accommodate state and federal concerns in hydroelectric projects.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that the recommendations of the agencies cannot be lightly dismissed. FERC is not required to adopt recommendations that are inconsistent with any other purpose of the Federal Power Act as expressed in section 4(e). See *id.* at 22.

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